THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:5.07.2007

\+ WP(C) No.12461/2005

M/S L.K.P. MERCHANT FINANCING LTD. ...Petitioner

- versus -

SPECIAL DIRECTOR, ENFORCEMENT DIRECTORATE & ANOTHER ...Respondents.

Advocates who appeared in this case:
For the Petitioner : Mr A.N. Haskar Sr Advocate with Mr
For the Respondent : Mr Mayank Goel.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner is aggrieved by the order passed by the Appellate Tribunal for Foreign Exchange dated 7.7.2005 requiring the petitioner to furnish a bank guarantee of 50% of the penalty amount by way of pre-deposit for the hearing of the appeal before the said Tribunal. The penalty that has been imposed upon the petitioner by virtue of the adjudication order dated 30.11.2004 is to the extent of Rs 1,00,000,00/-. The main case of the petitioner is that the petitioner was a money changer recognised and registered with the Reserved Bank of India and that it released foreign exchange to the extent of

USD 27,90,700 amounting to approximately Rs 9 crores to various companies/firms for the foreign travel of their representatives. It has transpired that the said firms/companies were fictious and those persons never travelled abroad. Instead, the foreign exchange that was obtained by them found its way into the domestic market.

2. Mr Haksar, the learned senior counsel, who appeared on behalf of for the petitioner, submitted that all that the petitioner was required to do was to comply with the full-fledged money changers Guidelines (FLM) issued by the Reserve Bank of India. He submitted that the guidelines have been provided in the form of a memorandum in Appendix 3X. Paragraph 12 (ii) of the appendix requires the money changer to comply with six stipulations before foreign exchange is released to an applicant. It is the case of Mr Haksar that all six conditions have been complied with. To make out a prima facie case, Mr Haksar referred to the preliminary report dated 24.5.1996 issued by the Reserve Bank of India, a copy whereof has been placed as Annexure P-5 at page 71 onwards. At page 74, paragraph 7 of the Special Note reads as under:-

> "7. Though the applications submitted by the exporters for release of foreign exchange was prima facie in order in the sense that it conformed to the provisions with reference to the quantum, duration and documentation indicated in para 12(i) A of the FLM the similarity with regard to the quantum of FE sought, the frequency of travel undertaken by the various official of the same exporter within such a short time of its existence and boosting their release of exchange to 5.2 crores and 8.3 crores in May and June 1995 when their normal turnover is around 1.5 crores should

> have put a prudent FFMC on caution but in the present case the FFMC has not only been not on the guard but also allowed it to occur for more than six months. The attitude of the FFMC gives room to doubt its bonafides though it cannot be conclusively proved."

According to Mr Haksar, this makes it more than clear that strictly speaking, the provisions of the memorandum have been fully complied with. Though, it was contended on behalf of the Reserve Bank that the petitioner ought to have been prudent and more care should have been taken. According to him, the very fact that the Reserve Bank has stated that the application submitted by the exporter for release of foreign exchange was, *prima facie*, in order in the sense that it conformed to the provisions with reference to the quantum, duration and documentation indicated in para 12 (i) A of the FLM, meant that the petitioners complied with the stipulations of the Reserve Bank of India which were applicable to money changers such as the petitioner. He submits that clearly the adjudicating authority ought not to have directed the imposition of a penalty because all that the petitioner was required to do, was to strictly comply with the provisions of the guidelines prescribed by the Reserve Bank of India, which it did.

3. Mr Haksar then referred to the impugned order and submitted that although the Tribunal found that the petitioner had a triable case it still went on to say that the petitioner does not have a good prima facie case. He submitted

that this would be a contradiction inasmuch as the very demonstration of a triable case implies and means that the petitioner has been able to establish a prima facie case. I agree with the submission made by Mr Haksar.

4. Mr Haksar also referred to paragraph 8 of the impugned order wherein the question of financial hardship was discussed. According to the Tribunal, although the Chartered Accountant's certificate indicates that the petitioner had losses for two financial years 2002-03 and 2004-04, it was beyond its understanding as to how such substantial losses could occur in the business of money changing where the rupee value continued to be on the lower side in comparison to foreign currency during the period 1994-95 and, accordingly, it felt that judicial notice could be taken of the same. Mr Haksar submitted that once the duly certified accounts were presented to the Tribunal without returning a finding as to the credibility of the said accounts, the Tribunal ought not to have simply debunked the certificate and surmised that the petitioner did not suffer any losses.

5. The learned counsel on behalf of the respondent submitted that one of the employees of the petitioner company itself admitted that mistakes and lapses had been committed by them in releasing the foreign exchange for business purposes of six persons during May to July 1997 without ascertaining the place of visit, date of travel and countries to be visited. In response to this

Mr Haksar pointed out the relevant portion of the statement of the said employee (H. Jerome), which is to the following effect:-

> " I am unable to recall how there is a lapse in the release of Foreign Exchange to the following persons by the Company."

He submitted that this statement is entirely different to what had been stated by the learned counsel for the respondent and, therefore, no capital can be made out of this statement.

6. Considering the arguments advanced by the learned counsel for the parties and the impugned order, I find that there are two infirmities which require correction. The first infirmity is that, having found that the petitioner had a triable case, the Tribunal could not have said that the petitioner did not have a prima facie case. Secondly, the question of financial hardship has also not been adequately dealt with. Once the figures are presented and are duly certified by the Chartered Accountant, then the Tribunal has to go by those figures and not by its own surmise and conjecture. In terms of the certified accounts, the company had been incurring losses. Therefore, the Tribunal ought not to have brushed it aside and taken purported "judicial notice" of what the Tribunal referred to as "rupee value continued to be on the lower side in comparison to foreign currency during the period 1994-95." This statement by itself is quite unclear as to how that would result in any profit or loss. So even

if "judicial notice" is taken, it would not be possible to determine as to whether a company would make a profit or loss merely based on such a factor.

7. For all these reasons, I feel that the impugned order is not sustainable and the Tribunal has proceeded on entirely erroneous grounds. Accordingly, the same is set aside. The Tribunal is directed to hear the appeal of the petitioner without any requirement of pre-deposit. This matter has been pending before the Tribunal since 2004 and has already had two rounds before this Court. Therefore, it would be appropriate that the same is taken up and disposed of at an early date. In the first instance, the matter be placed before the Tribunal on 17.8.2007.

8. This writ petition stands disposed of.

BADAR DURREZ AHMED
(JUDGE)

July 5, 2007
J